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No. 89-580

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

KENNETH ABRAMS, *et al.*,
Petitioners,

v.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below abused their discretion in denying a preliminary injunction against the collection of agency fees.

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BRIEF IN OPPOSITION

The opinions below, the basis for this Court's jurisdiction, and the constitutional and statutory provisions involved are correctly described in the petition for *certiorari*. Pet. 1-4.

STATEMENT OF THE CASE

1. This action was brought by four employees of private telephone companies (petitioners in this Court), who work in collective bargaining units represented by the Communications Workers of America ("CWA" or "Union"), and who pay agency fees to CWA pursuant to collectively bargained union security provisions. The complaint alleges that CWA has committed constitutional

and statutory violations in its administration of these agreements.

As the district court noted in one of the rulings challenged here, CWA has maintained an internal procedure for accomodating the objections of nonmember fee payers that was modified following this Court's decision in *Communications Workers v. Beck*, —— U.S. ——, 108 S.Ct. 2641 (1988), to insure that the Union's procedure is in full compliance with the requirements stated in that opinion. Pet. App. 17a n. 1.

Under the CWA procedure, agency fee payers are annually reminded of their right to object to supporting union political expenditures as well as other expenditures not germane to collective bargaining. The notice reminding fee payers of this right also explains which expenditures will be charged to objecting fee payers and which expenditures will not be so charged. Objecting fee payers receive an advance reduction payment based on the Union's audited allocation of its previous year's expenditures into the chargeable and nonchargeable categories, and premised on the expectation that the objectors will pay fees throughout the entire year of objection. Along with the advance reduction payment, each objector receives a detailed list of expenditures broken down into the chargeable and nonchargeable categories, and the special report of the certified public accountants who audited the Union's allocation of expenditures. An objector may challenge the calculation of the advance reduction before an arbitrator appointed by the American Arbitration Association, and while a challenge is pending forty percent of the objector's reduced fee payment is held in escrow. Appendix in *Abrams v. Communications Workers*, D.C.Cir. No. 88-7234, pp. 62-90. *Compare* NLRB General Counsel Memorandum 88-14 (Nov. 15, 1988) (interpreting *Communications Workers v. Beck, supra*) *with Chicago Teachers Union v. Hudson*, 475 U.S. 292,

310 (1986) (establishing the "constitutional requirements" for public sector union security agreements).

2. After preliminary proceedings, the district court (Lamberth, J.) entered an order (i) dismissing the petitioners' constitutional claims, (ii) denying their motion for a preliminary injunction, and (iii) setting down the petitioners' statutory fair representation claims for consideration on a motion for summary judgment to be filed by the defendant Union.[1] Order of Oct. 25, 1988. The petitioners moved for reconsideration of the denial of a preliminary injunction, or in the alternative for an injunction pending appeal. The district court denied these motions. Pet. App. 13a-18a.

The petitioners appealed from the denial of a preliminary injunction, and moved for an injunction against collection of fees pending appeal. The court of appeals (Starr, Williams and Sentelle, JJ.) denied the request for an injunction pending appeal "for the reasons stated by the district court in its well-reasoned explanation in the memoranda and orders issued on October 25, 1988 and November 7, 1988." Order of Dec. 14, 1988.

Acting *sua sponte* the court of appeals set the petitioners' appeal for disposition without oral argument pursuant to D.C. Circuit Rule 13(i). Order of June 22, 1989.[2] On July 13, 1989, the court of appeals (Mikva, Edwards and Ruth B. Ginsburg, JJ.) ordered that "the

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[1] CWA filed its summary judgment motion on November 22, 1988, but the district court has stayed consideration of that motion while the petitioners pursue limited discovery.

[2] D.C. Circuit Rule 13(i)(2) provides: "Except upon a stipulation to dispense with oral argument, a case may be decided without oral argument only if a three-judge panel of this Court unanimously concludes that: (A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) facts and legal arguments are adequately presented in the briefs, pleadings, and record, and oral argument would not significantly aid the Court."

district court's orders, filed October 25, 1988 and November 7, 1988, be affirmed for the reasons stated in the memoranda accompanying those orders." Pet. App. 2a.

ARGUMENT

The *certiorari* petition seeks review of an interlocutory decision of the courts below denying a preliminary injunction. Such review is requested while the merits of the petitioners' statutory claims are *sub judice* on a summary judgment motion filed at the district court's direction. There is nothing in the *certiorari* petition to indicate that this Court should take the extraordinary step of reviewing this matter in piecemeal fashion by taking jurisdiction at this preliminary stage before the courts below have ruled on all of the claims presented.

Far from being an abuse of discretion, the denial of a preliminary injunction by the courts below was based on two independent grounds, each firmly established by this Court's precedents. First, the courts below determined that a preliminary injunction against the collection of agency fees would be contrary to federal labor policy as explicated by this Court's decisions on this very issue. Second, the courts below found that the petitioners had failed to show any substantial danger of irreparable harm, and thus had not established the necessary predicate for the issuance of a preliminary injunction.

1. In the district court, the petitioners "move[d] for a preliminary injunction enjoining the defendant [CWA] from demanding or collecting 'agency fees' through agreements entered with employers under color of the National Labor Relations Act." Mem. of Pts. & Auth. in Supp. of Motion for a Prel. Inj. 1, *Abrams v. Communications Workers*, D.D.C. No. 87-2816 (RCL), docket nr. 15 (Sept. 29, 1988). The petitioners argued that they were "entitled to a preliminary injunction enjoining CWA from 'exacting' 'demanding' or 'collecting' dues-equivalent (or any other) agency fees from them until CWA meets

its burdens of proof under [*Communications Workers v.*] *Beck*[, —— U.S. ——, 108 S.Ct. 2641 (1988),] and [*Chicago Teachers Union v.*] *Hudson*[, 475 U.S. 292 (1986)]." *Id.* at 12.

The district court determined that such an injunction would be contrary to "the federal labor policy against injunctions as recognized in *Machinists v. Street*, 367 U.S. 740 (1961), and *Railway Clerks v. Allen*, 373 U.S. 113 (1963)." Pet. App. 12a.

Applying the teachings of *Machinists v. Street*, *supra*, the *Allen* Court made two rulings that are fatal to the petitioners' demand for a preliminary injunction against CWA's collection of agency fees. First, *Allen* holds that "an injunction relieving dissenting employees of all obligation to pay the moneys due under an agreement authorized by [the federal labor acts] [i]s impermissible." 373 U.S. at 119. Second, *Allen* also holds that "dissenting employees (at least in the absence of special circumstances not shown here) can be entitled to no relief until final judgment in their favor is entered." *Id.* at 120.

While *Street* and *Allen* arose under the Railway Labor Act ("RLA") and the instant cases arise under the National Labor Relations Act ("NLRA"), the union security authorizations in both statutes are "in all material respects identical in language and structure." *Communications Workers v. Beck*, *supra*, 108 S.Ct. at 2648. Moreover, the anti-injunction policy of the Norris-LaGuardia Act applies equally to cases arising under both labor statutes.

It is perhaps most to the point that the petitioners do not even discuss the anti-injunction rulings in *Street* and *Allen*, much less show that the courts below erred in following those rulings.[3]

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[3] While ignoring *Street* and *Allen*, the petitioners rely on two cases approving *final injunctions against racial discrimination*: *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192 (1944), and

2. The courts below concluded that the petitioners were not entitled to a preliminary injunction on a second, wholly independent ground: that the petitioners had failed to demonstrate any substantial danger of irreparable harm. The plaintiffs' claim is that, despite CWA's adjustment of their agency fees through its internal objection procedures, the Union is still charging them too much. As the district court noted, "Plaintiffs' claim thus becomes simply one for money damages, and it is well-recognized that money damages are rarely, if ever, irreparable." Pet. App. 11a. *See also id.* at 17a n. 1.

"The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). The petitioners allege a temporary deprivation of a very small percentage of their income. And, as the courts below recognized, "[i]t seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." *Sampson v. Murray*, 415 U.S. 61, 90 (1974).[4]

Graham v. Broth. of Locomotive Firemen, 338 U.S. 232 (1949). Pet. 15-16. Both of these cases were decided before *Street*, and as *Street* explains, raise very different policy concerns from those entailed in suits challenging the collection of union dues and fees. *Machinists v. Street*, *supra*, 367 U.S. at 772-773. *See* Pet. App. 16a.

[4] Relying upon *United States v. San Francisco*, 310 U.S. 16 (1940), the petitioners assert that, because they have alleged a statutory violation, the only relevant inquiry in determining whether to issue a preliminary injunction is their likelihood of success on the merits. Pet. 18-19. That case holds only that a court may enter a *final injunction* against statutory violations without "a balancing of equities. . . ." 310 U.S. at 18. This Court has consistently held that in the preliminary injunction context, even where a statutory violation is found, "an injunction is an equitable remedy that does not issue as of course." *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987).

The petitioners' claim that their alleged monetary loss is different, because it involves a constitutional violation, is doubly wrong.

First, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the plaintiffs established state action (by showing that their employer was the state), *id.* at 226, and a constitutional violation (by showing that the state law had been construed to allow the expenditure of fees collected from objecting public employees on political activities), *id.* at 215. Nevertheless, this Court held that the state "court was *correct in denying the broad injunctive relief requested.*" *Id.* at 241 (emphasis added).

Second, as the opinions below also demonstrate—and as is made even clearer by the extended analysis in *Kolinske v. Lubbers*, 712 F.2d 471, 474-480 (D.C.Cir. 1983), on which the opinions below rest—under this Court's recent state action decisions, the proposition that the First Amendment would apply to a private collective bargaining agreement is untenable. "[T]his Court has held that a government can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government." *San Francisco Arts and Athletics v. United States Olympic Committee*, 483 U.S. 522, 546 (1987) (citations and internal brackets and quotation marks omitted). Since, as the courts below noted, "there was no direct governmental involvement in either the parties' adoption of or their continued adherence to the agency shop clause," there is no basis for finding state action in the administration of that contract clause. Pet. App. 9a (internal quotation marks omitted).[5]

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[5] The petitioners rely on *Abood v. Detroit Board of Education, supra*—a public sector case—and on *Ellis v. Railway Clerks*, 466 U.S. 435 (1984)—a case arising under the RLA—to establish state action in agreements covered by the NLRA. Pet. 10-11. However,

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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to the extent that *Abood* even mentions the NLRA, the opinion strongly suggests that agreements negotiated under that statute are *not* subject to constitutional constraints. 431 U.S. at 271 n.10 & 226 n.23. And RLA cases, such as *Ellis*, shed no light on the state action issue under the NLRA, for the simple reason that state action was found in the RLA cases because of that statute's preemption of state union security laws and the NLRA has no such preemptive effect. *Communications Workers v. Beck, supra*, 108 S.Ct. at 2656-57. *See also* Pet. App. 4a-9a, 13a-15a.

We recognize that in *Communications Workers v. Beck, supra*, the Court left this issue open for another day. But for the reasons we noted at the outset this case, in its current posture, does not present an appropriate vehicle for reaching the question. While the interlocutory decisions of the courts below dismissed the petitioners' constitutional claim, their statutory claim is still pending in the district court. It would be contrary to this Court's considered practice to take up the constitutional issue in isolation from the statutory issue. *See DeBartolo Construction Corp. v. Florida Gulf Coast Building and Construction Trades*, —— U.S. ——, 108 S.Ct. 1392, 1397 (1988). And, as the petitioners have failed to show any abuse of discretion in the lower courts' denial of a preliminary injunction, there is no necessity to deviate from that practice here.